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IN THE

MICHAEL RODAK, JR., CLERK

**Supreme Court of the United States**

October Term, 1976

No. **76-1144**

Minnesota Civil Liberties Union, Americans United for Separation of Church and State, Minnesota Education Association, Minnesota Association of Secondary School Principals, Minnesota Association of School Administrators, Minnesota Congress of Parents, Teachers and Students, Minnesota Federation of Teachers, Matthew Stark, Kathleen Hauser, Donald K. Krause, individually and on behalf of the taxpayers of the State of Minnesota,

*Plaintiffs-Appellants,*

vs.

Howard Casmey, Commissioner of Education of the State of Minnesota, et al.,

*Defendants-Respondents.***JURISDICTIONAL STATEMENT****WILLIAM I. KAMPF***Attorney for Appellants*

310 Empire Building

St. Paul, Minnesota 55101

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*Plaintiffs-Appellants,*

vs.

Howard Casmey, Commissioner of Education of the State of Minnesota, James Lord, Minnesota State Treasurer, Dorothea Chelgren, David C. Brandon, Henry J. Bromelkamp, Daniel F. Burton, Lorin A. Gasterland, Erling O. Johnson, Ruth A.



Myers, Louis R. Smerling, Henry G. Tweten, as members of  
the State Board of Education of the State of Minnesota,  
*Defendants-Respondents,*

and

Lisa Garcia, Christine Garcia and Julie Anne Garcia, minors,  
by their father and mother and natural guardians, Ernest  
Garcia and Lupe Garcia, and Ernest Garcia and Lupe Garcia,  
individually; Robert E. Slater, III, Joseph F. Slater, Susan  
C. Slater, Thomas S. Slater, Timothy P. Slater, Sheila M.  
Slater, and Shannon C. Slater, minors, by their father and  
natural guardian, Robert T. Slater, Jr., and Robert E. Slater,  
Jr., individually; Donna Wheaton, a minor, by her mother and  
natural guardian, Emma Hilliard, and Emma Hilliard, indi-  
vidually; and Leigh Ann Spears and Lisa Spears, minors, by  
their father and natural guardian, William Spears, and  
William Spears, individually,

*Defendant Intervenor-Respondents,*

and

David and Julaine Wachholz, individually, and Amy, Michael  
and Laurel Wachholz, minor children, by their parents and  
natural guardians, David and Julaine Wachholz; James P.  
Larkin, individually, and Ann, Matthew, Thomas, Mary,  
Cecilia, Joan, Eileen, Gregory, John and Margaret Larkin,  
minor children, by their parent and natural guardian, James  
P. Larkin; Willis Weiberdink, individually, and Joan, Jan, and  
Wesley Weiberdink, minor children, by their parent and natu-  
ral guardian, Willis Weiberdink; Robert E. and Rose Mary  
Geist, individually, and Robert E., Jr., Rose Mary, Christo-  
pher, and Larry Geist, minor children, by their parents and  
natural guardians, Robert E. and Rose Mary Geist,

*Defendant Intervenor-Respondents.*

## JURISDICTIONAL STATEMENT

## STATEMENT OF THE CASE

Chapter 396 is the latest in a series of laws adopted by the  
Minnesota Legislature designed to support financially the edu-  
cation of pupils in sectarian and other nonpublic schools. The  
Act provides for the distribution of educational aids to non-  
public schools and their students. The Act became effective  
July 1, 1975. Section 8 of Chapter 396 provides for annual ap-  
propriations in the amount of \$12,000,000.

Appellants filed their complaint in this action on January  
14, 1976, challenging the validity of the new law under the  
First Amendment of the United States Constitution.

The three-judge panel heard the case on September 28,  
1976, on the briefs, arguments of counsel and a factual record  
consisting of a comprehensive stipulation of facts and certain  
exhibits, to-wit: exhibits incorporated by the Stipulation; an  
affidavit sustaining the responses to plaintiffs' questionnaire;  
a memorandum from the office of the Attorney General ap-  
proving a procedure whereby private schools ordered mate-  
rials directly without approval of the local district or prior  
requests by students; an affidavit of Rosemary Sommerville  
regarding her inspection of 10% of the involved districts; an  
affidavit of Leo Bernat regarding the reliability of the results  
of plaintiffs' survey as to questions not submitted into evi-  
dence.

On November 29, 1976, the District Court announced its  
decision and opinion upholding the constitutionality under the  
Establishment Clause of those Sections of the Act which are  
operative.

## QUESTIONS PRESENTED

1. Does state law violate the Establishment Clause of the First Amendment by providing instructional materials for use in church-related elementary and secondary schools when the law purports to provide only materials which are available for and of benefit to individual students, but permits the use and possession of materials to be given to the schools and provides items which had previously been purchased by parents and can only be used practicably by teachers and groups of students?

2. Does the actual operation of Chapter 396 have the primary effect of advancing religion or impermissibly entangling the State in religious affairs?

3. Does a state violate the Establishment Clause of the First Amendment by providing auxiliary services and equipment for use in church-related schools when such aids are formally requested by students, equipment is provided for use by students, a state board is required to designate items capable of being used for religious instruction, and the auxiliary services provided are limited to such services as are provided to public school students?

## JURISDICTIONAL STATEMENT

Appellants appeal from that part of the order of the United States District Court for the District of Minnesota (hereinafter the "District Court") entered by a three-judge District Court on November 29, 1976, upholding the constitutionality of Minnesota Statutes §123.932 and §123.933 and refusing to enjoin defendants from effectuating Minnesota Statutes §123.932 through §123.937, which provide state funds for the implementation and support of a program providing teaching aids for the use of children attending nonpublic schools including sectarian schools.

Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented. The following are the interests of the parties to this appeal:

1. The individual appellants are citizens and taxpayers of Minnesota and the United States;

2. The organizational plaintiffs are parties interested in maintaining the separation of church and state whose members include numerous citizens and taxpayers of Minnesota and the United States;

3. The defendants are required by the laws of the State of Minnesota to implement all or part of Chapter 396 and are sued solely in their capacities as officials of the State of Minnesota;

4. Intervenor defendants are students or parents of students who attend nonpublic schools and represent the interests of pupils attending sectarian and non-sectarian schools and their parents.

The final order appealed from was entered by the District Court on November 29, 1976, upholding the constitutionality

of Chapter 396 and denying an injunction against its effectuation. Notice of appeal to this Court was filed in the District Court on January 13, 1977.

Jurisdiction of the direct appeal is conferred on this Court by 28 U.S.C. §1253 and *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); and *Meek vs. Pittinger*, 421 U.S. 349 (1975).

### STATUTES INVOLVED

The text of Chapter 396, Minnesota Statutes §123.931 through §123.937 is set forth in the Appendix hereto, A. 19-25. The regulations implementing Chapter 396, Minnesota Regulations, Department of Education §740 through §742 are set out *infra*, A. 25-28.

### OPINION BELOW

The order and opinions of the District Court are not reported. They are set out *infra*, A. 1-16.

### JURISDICTION

Pursuant to Title 28 United States Code §§1343(3), 2201, 2202, 2281, 2284, and Title 42 United States Code §1983, plaintiffs filed their complaint in the District Court on January 15, 1976, alleging that Chapter 396 of the Laws of Minnesota, 1975, Minnesota Statutes §123.931 through §123.937 (hereinafter "Chapter 396") violates the First and Fourteenth Amendments of the United States Constitution by effecting an establishment of religion. The complaint demanded preliminary and permanent injunctions against the effectuation of the Statute as well as other relief.

On June 18, 1976, pursuant to 28 U.S.C. §2284, a three-judge court was convened to hear and decide the law suit.

### THE QUESTIONS ARE SUBSTANTIAL THE ISSUES PRESENTED ARE OF NATIONWIDE CONCERN

There is a striking similarity between state aid programs for sectarian schools and their students in numerous states including New York, New Jersey, Vermont, Illinois, Ohio and Pennsylvania. Such plans, when approved by federal courts, will be copied by legislatures across the nation, particularly where such plans achieve results prohibited by *Meek v. Pittinger*, 421 U.S. 349 (1975) and *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.C.N.J. 1973), *aff'd* 417 U.S. 961 (1974). The Minnesota assistance plan is similar to other state programs of questionable First Amendment consequence. If the Minnesota plan is adopted by other states, it is probable that hundreds of millions of dollars in public aids will be distributed to religious enterprises in contravention of the First Amendment.

### INSTRUCTIONAL MATERIALS RATIONALE OF THE DISTRICT COURT

Except for the treatment of textbooks as instructional materials, the materials distributed pursuant to Chapter 396 are substantially identical to those in *Meek* and *Marburger*. The religious character of the private schools selecting the materials is predominately the same in all three cases. The District Court reasoned that instructional materials would be constitutionally provided under the same conditions applied to the loan of textbooks in *Meek*. A.13. The court subsumed that the opinion in *Meek* "objected solely to the form of these programs, the loan of materials directly to the schools," A.13, concluding that a change in the technical form of ownership of the mate-



rials made the loan constitutionally permissible. This reasoning directly conflicts with prior holdings of this Court for the following reasons:

1. This Court in *Meek* and *Marburger* objected not only to the form of ownership of the materials but to the potential diversion of the materials; and under Chapter 396 materials could not be and are not loaned in the manner textbooks were loaned in *Meek* and *Board of Education v. Allen*, 392 U.S. 236 (1968).

2. A change in the form of ownership does not alter the primary beneficiary of the program.

### DIVERSION

This Court noted that the result in *Meek* was directly supported if not compelled by its affirmance of *Marburger*:

"excessive entanglement of church and state would result from attempts to police use of materials and equipment that were readily divertible to religious uses. *Marburger* at 38-39. This Court's affirmance of *Marburger* was a decision on the merits entitled to precedential weight." 421 U.S. at 366-67, n. 16.

The part of the *Marburger* opinion referred to is:

"Most of these items obviously can be used with equal facility in the teaching of religious studies as well as they can be used in the teaching of secular, non-ideological subjects. To see to the enforcement of the legislative intent — given the obvious adaptability of supplies, instructional materials and 'equipment' — a constant, continuous review and control of the manner in which the supplies, materials and equipment were utilized would have to be undertaken. It is this necessity then, to enforce the limitation on the use of funds that will forever demand a state

involvement continuing an intolerable government presence in the affairs of the Church." 358 F. Supp. at 38-39 (D.C. N.J. 1973), *aff'd* 417 U.S. 961.

Thus, the inherently adaptable materials of Chapter 396 could never be practicably or constitutionally subjected to the policing method which prevented the misuse of less divertible textbooks in *Allen* and *Meek*.

Rather than implementing obviously unconstitutional controls, Minnesota chose to loan easily divertible materials virtually without restraint. No statute, regulation or administrative procedure requires the examination of materials for sectarian content. In fact, regulations require officials to process and transmit pupil requests and then to purchase and distribute books based upon the processed requests, Minn. Regs. Ed. §741(b)(1), (2). Administrators thereby are denied discretion to reject a request and are relegated to a purely ministerial role. In practice, not even rubber stamping is required because private schools may order materials directly on behalf of the local district. See Memorandum from the Office of the Attorney General.

Actual administration is chaotic. Plaintiffs' questionnaire demonstrates that in a large majority of districts, books are not read to determine the religious content, nor do standards for secular content exist. Plaintiffs' Affidavit, A.34, 35, Questions 5, 7 and 8. The District Court found the questionnaire indicated "that few of the districts have any established book lists or other formal screening methods". A.11. But at the same time, the Court then found that the statute "presumes an initial determination by public officials that the materials in question are suitable for use in public schools and therefore 'secular' in nature". A. 11-12. This contradictory presumption

raises serious First and Fourteenth Amendment questions that can only be answered by this Court.

The only limitations on Chapter 396 materials are that they be secular, neutral and non-ideological, A.11, Minn. Stat. § 123.932, subd. 1, and that a standard of secular content is said to be set by the requirement that books be suited for use in public schools. A.9. Minn. Stat. § 123.932. Both secularity and availability for use in public schools were required in the materials programs invalidated in *Meek*, 421 U.S. at 355 and *Marburger*, 358 F. Supp. at 31.

In *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973), the Court rejected the argument that the Act was constitutional because the aids were required to be "secular, neutral and non-ideological," 413 U.S. at 478; the aids were an integral part of the teaching process; and "no attempt is made under the statute and no means are available to assure that internally prepared tests are free of religious instruction." 413 U.S. at 478. Moreover, availability for use in public schools does not assure that materials would be either secular or incapable of diversion when used in sectarian schools. The Bible is suitable for use in public schools. *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963). The Court took notice of plaintiffs' argument that many books, pamphlets and other materials approved for use in public schools contain accounts of religious events and religious philosophies. A.14, n. 5. See also Minneapolis Public Schools List of Approved Materials.

The District Court found these limitations adequate and declared that the Supreme Court

"has never stated that an elaborate system of screening and prior approval is necessary in order to guarantee that an aids scheme will not have the primary effect of advancing religious activity". A.12.

The Court reasoned that materials could be provided constitutionally under the same conditions applied to textbooks in *Meek* and *Allen*. A.12-13. However, the textbook programs in *Meek* and *Allen* bear little resemblance to the unpoliced Minnesota program. Although true textbooks are less subject to diversion, the *Marburger* opinion directly infers that some procedure must be instituted to police the loan of textbooks. The Court, in *Allen*, which was constitutionally indistinguishable from *Meek*, 421 U.S. at 359, assumed that public school authorities have a duty to determine whether each book loaned is secular or religious and that such duties will be honestly discharged under the law.<sup>1</sup> *Allen*, 392 U.S. at 245. *Meek* involved a rigid procedure for the approval of textbooks. Books distributed to private school students had to appear on a list of books approved by a state board which promulgated standards in the form of guidelines. 421 U.S. at 379. The procedure upheld in *Allen* was not as strict, but each book loaned was approved by a public school official who was required to screen the contents of the textbook. The Court in *Levitt* found that the reason textbook aid is distinguishable from other forms of aid is that "a textbook's content is ascertainable but a teacher's handling of a subject is not." 413 U.S. at 481. Standards for determining secularity and religiosity of content were set forth in state guidelines. 392 U.S. at 245. Justice Douglas discussed some of the standards in his dissent. 392 U.S. at 254-270; Guidelines for Administering New York Textbook Law, 5 N.Y. Education Dept. 6/28/67 p. 1 (Part of the record in *Allen* and quoted in 79 Yale L. Rev. 111, 121 [1969]).

<sup>1</sup> This is directly implied by the statement, "Absent evidence, we cannot assume that school authorities . . . are unable to distinguish between secular or religious books or that they will not honestly discharge their duties under the Law." *Allen* 392 U.S. at 245.



The Court should have followed *Committee for Public Education v. Nyquist*,

"[i]n the absence of guarantees that the state aid derived from public funds will be used exclusively for secular, neutral and non-ideological purposes, it is clear from our cases that direct aid in whatever form is invalid." 412 U.S. at 780.

In most cases, only private school personnel police the distribution of materials. In discussing auxiliary aids, the Court in *Meek* rejected the proposition "that it was sufficient for the state to assume that teachers in church related schools would succeed in segregating their religious beliefs from their secular educational duties". 421 U.S. at 369.

#### SUBSIDIZATION OF RELIGIOUS ENTERPRISES AND THE CHILD BENEFIT THEORY

The sole remaining difference between the Minnesota program and the instructional materials program rejected in *Meek* and *Marburger* involves the technical form of ownership of the materials. However, change in the form of ownership does not alter the adaptability of materials, the core of *Marburger*, nor does it prevent the subsidization of religious education found in *Meek*. In his dissent, Judge Larson recognized the "form of the loan to be a mere fiction created in an attempt to avoid constitutional objections to a scheme that benefits the private schools primarily and the students only incidentally". A.14. He reasoned that "the characterization of materials that are traditionally and effectively useable in a group setting or with group access as being loaned to students is a triumph of form over substance". A.15. The District Court found that

schools may be given the use and possession of the materials.

A.13. In practice, use of many of the materials including globes, large charts and maps and audio-visual materials by teachers as well as by students would be unavoidable. Essentially, the statute establishes what Judge Larson called "a Byzantine scheme for the distribution of property rights in re-useable instruction materials purchased with public funds".

A.15.

Application of the child benefit theory to this type of case has but one precedent, *Wolman vs. Essex*, C-2-75-792 (S.D. Ohio, July 21, 1976) and is directly contrary to the holding in *Norwood v. Harrison*, 413 U.S. 455, (1973). Schools are said not to be aided when assistance flows directly to students in the sense that "they obtain nothing from them [appropriations] nor are relieved of a single obligation because of them". *Cochran v. Board of Education*, 281 U.S. 370, 375 (1930). Consequently, the child benefit theory has been applied only to items that children or parents would be obligated to purchase in the absence of legislation. The Court in *Norwood* explained that

"[a]ppellees misperceive the child benefit theory of cases decided under the religion clauses of the First Amendment [citing *Cochran* and *Allen*]. In these cases, the Court observed that the direct financial benefit of the textbook loans to students is 'to parents and children—not schools—in the sense that parents and children—not schools—would in most cases be required to procure the textbooks if the state did not' ". *Norwood*, 413 U.S. at 464, n. 7.

In the instant case, neither argument nor evidence was presented to show that parents or children had procured the materials provided by the Act. It is inconceivable that parents

provided globes, audio-visual materials, newspapers for general use or library books.

When the necessary expense of providing learning materials is borne by the State, the economic consequence is to aid the enterprise, *Norwood*, 413 U.S. at 464, in this case a church-related enterprise. See Stipulation ¶3A, A.30.

This Court will give plenary consideration to *Wolman v. Essex* where the court was unable to determine the substantive difference between textbooks, historically provided by the parents, and maps, charts, models, etc. *Wolman*, C-2-75-792 at 12. The District Court upheld Chapter 396 citing this statement in *Wolman*. A.13. Even if children were the primary beneficiaries of the Act, the District Court is still required to examine plaintiffs' arguments concerning diversion, entanglement and equal benefits. The Court in *Nyquist* held that the child benefit theory did not confer a per se immunity from examination of a program and is but one of many factors considered. 413 U.S. at 781. A District Court decision affirmed by this Court explained:

"[i]n *Allen*, the fact that parents and students were beneficiaries of this aid would not have prevented the Court from striking down the law if it provided for the loan of religious books." *Lemon v. Sloan*, 340 F. Supp. 1356, 1364-65 (1972), *aff'd* 413 U.S. 825 (1973).

The fact that aid was given to parents does not prevent a subsidy from having a primary effect of supporting religious institutions. In *Norwood*, even provision of textbooks to children was found to aid the operation of private schools. 413 U.S. at 464.

## ENTANGLEMENT

Aside from three scattered passing references in connection with other topics, the Memorandum Opinion does not reveal whether the District Court scrutinized the entanglement problems raised at length by plaintiffs. Entanglement is one of the three tests courts are bound to examine in cases involving the Establishment Clause. *Roemer v. Maryland Public Works Board*, — U.S. —, 96 S.Ct. 2337, 2347 (1976). Lack of thorough scrutiny warrants the attention of this Court.

Three features of the Minnesota program invite impermissible entanglement.

1. Failure to articulate the nature of state-sectarian school relations activates a presumption of entanglement. This Court held that:

"[t]he state is constitutionally compelled to assure that state supported activity is not being used for religious indoctrination." *Levitt v. Committee for Public Education*, 413 U.S. 472, 480 (1973) (quoting *Lemon v. Kurtzman*; see also *Nyquist*, 413 U.S. at 480).

This Court observed in *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971), that the history of government grants of continuing cash subsidies have (almost always) been accompanied by various measures of control and surveillance. A District Court in Vermont discerned the same pattern when the direct subsidy is in the form of auxiliary aids or instructional materials. *Americans United for Separation of Church and State v. Oakey*, 339 F. Supp. 545, 549 (D.C. Vt. 1972). The Vermont legislature provided teaching aids similar to those provided by Chapter 396 and failed to specify standards, controls, or parties responsible for implementation of restraints. *Oakey* followed *Levitt*, *Lemon*, *Nyquist* and *Tilton v. Richardson*,



403 U.S. 672 (1970), and enjoined further operation of the Vermont Act saying,

"[t]he actual mechanics of this intrusion by the employees of the school districts into sectarian schools is not spelled out by statute. Presumably the implementation of the plan is left to local districts themselves. The potential, however, for the involvement of the state, through school districts in various religious affairs is not dispelled by its lack of articulation." *Oakey*, 339 F. Supp. at 551.

The inconsistent results in *Oakey* in the instant case stress the necessity for plenary consideration of this case.

2. A localized decision making process magnifies administrative entanglement and political devisiveness. The *Meek* textbook aid program escaped entanglement difficulties by simply having one state-wide board approve books before use in public or private schools. 421 U.S. at 362. In Minnesota, a single item would have to be approved in each local district. The Minnesota law multiplies the number of potential reviews by the 176 districts containing private schools. Such reviews would be required not only of textbooks but of all materials not used in public schools. Local control reduces the expertise developed by the persons reviewing requests. Plaintiffs' questionnaire documents that few districts have developed standards or procedures for reviewing requests. Plaintiffs' Affidavit of Counsel, A.34, 35, discussing questions 5 and 7. The numerous administrative difficulties of uncontrolled and unstructured relations between districts and parochial schools will be aggravated by decisions of elected local school officials which will likely be the subject of political action in concentrated pockets of religious activism. This potential for localized, political-religious discord presents the precise danger

of which this Court warned in *Lemon v. Kurtzman*, 403 U.S. at 622.

3. By providing free secular materials the Act tempts sectarian schools to abandon religious materials of central importance to the teaching mission of the sponsoring churches. See Justice Stevens' dissent in *Roemer v. Maryland Public Works Board*, — U.S. — 96 S. Ct. at 2358.

### UNEQUAL BENEFITS

Accounting methods result in more valuable textbook benefits accruing to private school than to public school pupils. The per capita funding of programs for private and public school pupils are required to be equal, based on a statewide average. Minn. Stat. §123.933. The expenditure formula for public school students is calculated from expenditure account code numbers 220, 230, 240. Stipulation ¶14, A.13. These accounts are used to report not only state expenditures for student materials but also for textbooks provided for teachers. Stipulation ¶16, A.32.

The accounts also record expenditures for books not benefiting students in the classroom, such as books for general use and books kept in stock or retired to library use. See Exhibit C, Passim, especially Code 220. Code 220 also reports expenditures for certain supplementary textbooks and reference materials funded in part by federal sources. Stipulation ¶15, A.32. The inclusion of federal funding and non-student materials in calculating per capita funding of public schools necessarily dictates that more state funds are spent for materials provided for private school students than for public school students.

The District Court held that the provision of aid was valid only if private school pupils received no more than the same

benefits as are received for public school pupils, and found that benefits may be unequal. A.10. But the District Court asserted that the statute provided on its face for equal benefits and that any accounting deficiencies were "easily remediable", A.10, and merely ordered that the state alter its accounting procedures to reflect only the actual state funds spent for materials provided to public school students. A.10-11. In the two months since the Order was issued, the Department of Education has yet to propose regulations that could "easily" remedy the problem. This Order will take several years to cure the problem, if it can be cured, substantially reduce the funds spent for both private and public education, and require difficult, costly and entangling accounting and inventory control procedures. The scope of such an Order goes beyond the purview of the statute and extends judicial power far beyond the point countenanced by any previous decisions of this Court.

### TEXTBOOKS

Minnesota "textbooks" are unlike textbooks under the laws of any other state. In *Allen*, *Meek* and *Wolman*, textbooks had to be the principal or primary source of study material for a given class. Guidelines for Administering the New York Textbook Law 5, New York State Educational Department, 6/28/67, quoted in 79 Yale L. Rev. 111, 129, n. 81 (1969); *Meek*, 421 U.S. at 354; *Wolman*, C-2-75-792, at 8. In all three cases, textbooks and materials are provided under different conditions by separate sections or acts. New York Educational Law § 701; 24 Penn. Stat. § 195 C.E.; Ohio Rev. Code § 3317.06(a). In *Allen* and *Meek*, "textbooks" was operationally defined by public acts, selective approval being required of local or state officials. *Meek*, 421 U.S. at 361-62, n. 10. Guidelines

further restricted the selection. See Justice Douglas' discussion of restrictions imposed on textbooks in *Allen*, 392 U.S. at 254-269; Department of Education of Pennsylvania Guidelines for the Administration of Acts 194 and 195. Minn. Stat. §123.933 defines and treats textbooks as instructional materials. The District Court found that textbooks were loaned under the same conditions as other materials, title was passed in the same way, standards for insuring the secular nature and use of materials were the same, funds available for all materials including textbooks were calculated together, and the educational value and purposes of the textbooks and other materials were substantially the same. A.12. The District Court did not need to decide whether the provision of textbooks was void for overbreadth because it found constitutional the loan of all instructional materials, arguing the similarity of provisions for textbooks and other materials to find the loan of all materials permissible.

As instructional materials, textbooks are defined to include supplementary books, costs for repair and cartage and even dictionaries. Manual of Instructions for Uniform Accounting for Minnesota School Districts (1972 Revision) P. VI-29, Code 220. See Stipulation ¶13, A.32. The Code reporting costs for textbooks used in the formula designed to equalize private and public school expenditures, records costs for supportive books and booklets, various reference books and dictionaries. Stipulation ¶14, 15, A.32. See also Minneapolis Public School List of Approved Materials (the only such list known in the State). The open definition of textbooks in the Act and regulations thereto merely states that the term includes named items, not that the definition is limited to those items. The only definitional restriction of "textbook" is the boiler-plate circumscription applied to all materials: that they be "such secular neutral



and non-ideological materials as are available and are of benefit to Minnesota public school students" and are "available for the individual use of each pupil in a class or group". Minn. Stat. §123.932, subd. 1. This does not comport with any common definition of textbooks. As the Supreme Court of the State of Illinois said of the term "textbook":

"[t]he word is popularly understood to describe a book, rather than anything of lesser substantiality or permanence which expounds the principles of a given field of knowledge . . . and which is the basis for a course of study and not a general reference work or reference book on a subsidiary topic . . . a map is not a textbook nor is a collection of maps in an atlas nor is a dictionary." *Beck v. Board of Education of District No. 122*, 27 Ill. App. 3d 4, 325 N.E.2d 640, 644 (1975).

That Court also ruled out supplementary books and materials. This definition casts doubt on the District Court's findings that the loan of textbooks was substantially similar to the programs in *Allen*, *Meek*, (A.12) and *Wolman* (A.13).

In short, the Minnesota definition encompasses not only books that are the core of classroom study, but any supportive book. Each book useable by a class is a textbook. This expansive definition greatly increases the likelihood that textbooks will be used to further religious goals. If a textbook is a principal source of study for a class, it must be of a broad survey nature presenting a self-contained body of facts, organized to treat the secular course, and far more likely than supportive texts to present a balanced and complete view. By contrast, more particularized supportive books are likely to contain a single point of view, not be designed to teach the secular subject, and be more easily adaptable to teach other courses.

Numerous books on limited philosophical, historical and other topics which support a secular course may also support sectarian instruction. Dictionaries could be profitably used in connection with religious courses to look up religious words; and it would be anomalous to prohibit distribution of individual maps while permitting distribution of an atlas. Books not classified as textbooks but provided as instructional materials were impermissible in *Meek* and *Marburger*. See Act 195 § 1(b) P.S.A. Title 24, § 9-972A, defining instructional materials in *Meek* and *Marburger*. 358 F.Supp. at 34. Moreover, this case is distinguishable from *Allen* and *Meek* because "textbooks" are far more adaptable as discussed previously.

By finding an expense that would otherwise be borne by schools, the state subsidizes religious schools. Prior to the state textbook programs in *Allen* and *Meek*, parents of non public school children had to purchase their own textbooks. There is no evidence that such practice prevailed in Minnesota. In fact, it is improbable that parents provided all supportive books, dictionaries, reference works, and other educational materials.

Finally, the enlarged range of books classed as textbooks raises entanglement questions. In *Allen*, *Meek* and *Wolman*, one or perhaps two textbooks per class would have to be approved since textbooks had to be primary or principal sources of classroom study. When numerous secondary works qualify, there would be more requests to local boards, more reviews, and greater administrative entanglement resulting in political discord. Overburdened boards would be tempted to omit or abandon reviews resulting in the previously discussed advancement.



### AUXILIARY AIDS AND EQUIPMENT

The District Court refused to review the parts of Chapter 396 providing equipment and auxiliary services to nonpublic students, Minn. Stat. § 123.934 and § 123.935 respectively, because the Department of Education has no current plans to implement the Sections. A.5. Plaintiffs argued that the *Meek* holding controls regardless of Chapter 396 implementation. Plaintiffs challenge the facial validity of the statute as plaintiffs challenged the statutes in *Meek* and *Wolman* and raise similar issues. In *Wolman*, no part of the statute involved had been implemented. Arguments raised in the *Wolman* jurisdictional statement are applicable to this case. See *Wolman v. Essex*, Jurisdictional Statement at 21-24, 28-29, 32-33. Services and equipment of the kind that would be provided pursuant to Chapter 396 were provided in both Pennsylvania and Ohio, and Minnesota requires services to be provided "in the students' respective schools whenever possible" as in *Meek*. Compare Minn. Stat. § 123.934 and § 123.935 and Act 194 quoted in *Meek*, 421 U.S. at 352-53.

### CONCLUSION

Chapter 396 is a convoluted scheme to funnel state aid to sectarian schools with minimal constraint. The District Court used bizarre fictions and elaborate, loosely-drawn statutory language to mask the lax administration and actual effects of the Act. It is a rudimentary legal principle that a statute fair on its face may be void on account of its operation. *Great Northern R. Co. v. Washington*, 300 U.S. 154, 161 (1936). This Court often has held that legislative allegations of permissible purpose will not sustain actions with impermissible effects. *Wright v. City Council of Emporia*, 407 U.S. 451, 462 (1972); *Nyquist*, 413 U.S. 756, 780. We urge this Court once again to look behind statutory language and grant plenary consideration to appellants.

This Court has never addressed the factual issues as to administrative procedures presented by this case. Plenary consideration of this case on a consolidated basis with *Wolman v. Essex* would be of benefit to legislators and administrators throughout the nation.

Respectfully submitted,

WILLIAM I. KAMPF

*Attorney for Appellants*

310 Empire Building

St. Paul, Minnesota 55101

Telephone: (612) 227-8209

The invaluable assistance of Nori Cross and Ronald Wallace is hereby gratefully acknowledged.

APPENDIX

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UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

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No. 3-76-Civil 8

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Minnesota Civil Liberties Union, Americans United for Separation of Church and State, Minnesota Education Association, Minnesota Association of Secondary School Principals, Minnesota Association of School Administrators, Minnesota Congress of Parents, Teachers and Students, Minnesota Federation of Teachers, Matthew Stark, Kathleen Hauser, Donald K. Krause, individually and on behalf of the taxpayers of the State of Minnesota,

vs.

Howard Casmey, Commissioner of Education of the State of Minnesota, James Lord, Minnesota State Treasurer, Dorothea Chelgren, David C. Brandon, Henry J. Bromelkamp, Daniel F. Burton, Lorin A. Gasterland, Erling O. Johnson, Ruth A. Myers, Louis R. Smerling, Henry G. Tweten, as members of the State Board of Education of the State of Minnesota,  
*Defendants,*

and

Lisa Garcia, Christine Garcia and Julie Anne Garcia, minors, by their father and mother and natural guardians, Ernest Garcia and Lupe Garcia, and Ernest Garcia and Lupe Garcia, individually; Robert E. Slater, III, Joseph F. Slater, Susan C. Slater, Thomas S. Slater, Timothy P. Slater, Sheila M.

Slater, and Shannon C. Slater, minors, by their father and natural guardian, Robert T. Slater, Jr., and Robert E. Slater, Jr., individually; Donna Wheaton, a minor, by her mother and natural guardian, Emma Hilliard, and Emma Hilliard, individually; and Leigh Ann Spears and Lisa Spears, minors, by their father and natural guardian, William Spears, and William Spears, individually,

*Defendant Intervenors,*

and

David and Julaine Wachholz, individually, and Amy, Michael and Laurel Wachholz, minor children, by their parents and natural guardians, David and Julaine Wachholz; James P. Larkin, individually, and Ann, Matthew, Thomas, Mary, Cecilia, Joan, Eileen, Gregory, John and Margaret Larkin, minor children, by their parent and natural guardian, James P. Larkin; Willis Weiberdink, individually, and Joan, Jan, and Wesley Weiberdink, minor children, by their parent and natural guardian, Willis Weiberdink; Robert E. and Rose Mary Geist, individually, and Robert E., Jr., Rose Mary, Christopher, and Larry Geist, minor children, by their parents and natural guardians, Robert E. and Rose Mary Geist,

*Defendant Intervenors.*

#### MEMORANDUM OPINION

Before HEANEY, Circuit Judge, and DEVITT and LARSON, District Judges.

PER CURIAM.

Plaintiffs Minnesota Civil Liberties Union (MCLU), Americans United for Separation of Church and State (Americans United), five organizations of public school teachers and ad-

ministrators, and three individual taxpayers, who are members of one or more of the plaintiff organizations, seek a declaratory judgment that Minnesota Statutes § 123.931-937 (1975), concerning aid to private schools, is invalid as "a law respecting an establishment of religion" prohibited by the United States Constitution.<sup>1</sup> They also requested preliminary and permanent injunctions against enforcement of the statute.

Pursuant to 28 U.S.C. § 2882, in force at the time the complaint was filed requesting the convening of a three judge court, a panel was appointed and a hearing as to final relief was had before it on September 28, 1976.

#### I. *Standing of the organizational plaintiffs to sue.*

As a preliminary matter, the Court must rule on defendants' motion to dismiss the organizational plaintiffs for lack of standing. Defendants assert correctly that these plaintiffs accurately allege, at most, injury to their members, all of whom are taxpayers; none believably alleges injury to itself as an organization,<sup>2</sup> and the MCLU and Americans United can claim only a historical civic interest in the issue before the Court.

The Supreme Court has held that individual taxpayers have standing to raise a constitutional challenge to Federal spending programs that may violate the Establishment Clause, *Flast*

<sup>1</sup> The statute is drawn to provide for aid to "nonpublic" schools. The parties do not dispute the conclusion that a large majority of the schools and students benefited by the statute are not only private but are operated by religious organizations, with the specific purpose of inculcating in their students religious values and adherence to a particular faith. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 at 625-642 (1971) (Douglas, J., concurring).

<sup>2</sup> A claim is made on behalf of the professional organizations that they may lose membership and financial support if State aid to private schools makes them a more attractive choice to students; the number of public school students drops, teachers are laid off, and organization membership suffers. The Court finds this a tenuous theory of injury.



*v. Cohen*, 392 U.S. 83 (1968), and plainly State taxpayers may also challenge State statutes on the same grounds. See *Lemon v. Kurtzman*, 310 F. Supp. 35 (M.D. Pa. 1969), *aff'd* 403 U.S. 602 (1971); H. M. Hart & H. Wechsler, *The Federal Courts and the Federal System*, (2d ed., P. Bator, et al. 1973), 181. It also has held that where an organization can allege "injury in fact" to its members, it may sue on their behalf where it seeks to challenge their treatment under a statute, regulation or ruling. *Sierra Club v. Morton*, 405 U.S. 727 (1973) (Administrative Procedure Act); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) (ruling by Comptroller of the Currency); *Eastern Kentucky Welfare Rights Organization v. Simon*, 44 U.S.L.W. 4724 (June 1, 1976) (IRS ruling under the Internal Revenue Code). The Court has not, however, made any clear pronouncement concerning the standing of organizational plaintiffs to sue on behalf of their members where the subject of the suit is a constitutional challenge to a statute, and its recent holdings on the issue, particularly in nonpublic school aid cases, have been inconsistent.

In *Lemon v. Kurtzman*, *supra*, the Court accepted without discussion the lower court's dismissal of the organizational plaintiffs. However, in *Meek v. Pittenger*, 421 U.S. 349, 365 n.5 (1975), another nonpublic school aid case, the Court confirmed the lower court's conclusion that organizational plaintiffs such as the ACLU, Americans United, and the NAACP were proper plaintiffs. In *Warth v. Seldin*, 422 U.S. 490 (1975), which involved a constitutional challenge to local land use planning practices, the Court recognized the right of organizations to assert the constitutional claims of their members but dismissed the case on grounds that the members themselves lacked the requisites of standing, so that the organizations could not derive standing from them.

The distinction between constitutional and statutory claim, as it affects standing, is a highly artificial one, and the trend of Supreme Court decisions is to blur that distinction. Given this trend and the participation here of individual taxpayer plaintiffs whose presence ensures that the case will not be dismissed, the Court finds that the organizational plaintiffs may remain in the case as representatives of their taxpayer members. See, *Public Funds for Public Schools of New Jersey v. Marburger*, 358 F. Supp. 29 (D. N.J. 1973), *aff'd* 417 U.S. 961 (1974); *Committee for Public Education and Religious Liberty v. Rockefeller*, 322 F. Supp. 678 (S.D. N.Y. 1971).

## II. The school aid statute.

The pertinent parts of the statute in question here provide for the loan of textbooks and other instructional materials to students in nonpublic schools (Minn. Stat. § 123.933); loan of "equipment," such as the apparatus used in science or physical education classes, to nonpublic school children (Minn. Stat. § 123.934); and provision of "auxiliary services" (counseling, testing, speech and hearing, etc.) to nonpublic students in their own schools where possible (Minn. Stat. § 123.935). Because the latter two sections have not been implemented and the State Department of Education has no immediate plans to do so, the Court is not in a position to evaluate the constitutionality of their application. Because constitutional application may be possible, the Court cannot find them facially unconstitutional. The only section of the statute at issue here, then, is § 123.933:

### "Purchase or loan of instructional materials"

The state board of education shall promulgate rules under the provisions of Minnesota Statutes, Chapter 15, requiring that in each school year, based upon formal requests by or on behalf of nonpublic school students in a nonpublic school, the local districts or intermediary service areas

shall purchase or otherwise acquire instructional materials and loan or provide them for use by children enrolled in that nonpublic school. These instructional materials shall be loaned or provided free to the children for the school year for which requested. The loan or provision of the instructional materials shall be subject to rules prescribed by the state board of education. In the case of consumable or nonreusable instructional materials the title and possession may be surrendered to the nonpublic school student for whom they are provided; in the case of nonconsumable or reusable instructional materials the title to same shall remain in the servicing school district or intermediary service area, and possession or custody may be granted or charged to administrators of the nonpublic school attended by the nonpublic school pupil or pupils to whom the instructional materials were loaned. The cost per pupil unit of the instructional materials provided for in sections 123.931 to 123.937 for each school year shall not exceed the statewide average cost per pupil unit spent by the Minnesota public elementary and secondary schools for instructional materials as computed and established by the department of education by each preceding October 1 from the most recent public school year data then available. The commissioner shall allot to the school districts or intermediary service areas the total cost for each school year of providing or loaning the instructional materials for the students in each nonpublic school which shall not exceed the product of the statewide average cost per pupil unit multiplied by the number of nonpublic school pupil units enrolled as of October 1 of the preceding school year."

The statutory definition of "instructional materials" includes:

"... textbooks, books, workbooks, published materials, reusable workbooks or manuals, whether bound or in looseleaf form, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, globes, sound recordings, . . . processed slides, transparencies, film, filmstrips, kinescopes, video tapes, . . . the term includes only such secular, neutral and nonideological instructional materials as are available and are of benefit to Minnesota public school students and are intended for use as implements or sources of study for a given class or group of students and which are expected to be available for the individual use of each pupil in such class or group; the term shall also include such secular, neutral, nonideological instructional materials as are normally provided and made available in public school libraries . . ." Minnesota Statutes, § 123.932 subd. 1 (1975).

The evaluation of a statute in light of the Establishment Clause involves three major considerations: whether the statute has a secular legislative purpose; whether its "primary effect" is "one that neither advances nor inhibits religion;" whether it fosters "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 603 at 612, 613 (1970). The Court finds that Minnesota Statute § 123.933, as written and as applied, satisfies these criteria.

#### A. Textbooks.

Although the statute describes textbooks as only one item in the broad category of "instructional materials," the current state of the law is such that textbook loans should be considered separately from loans of other materials. In *Board of Education of Central School District No. 1, et al v. Allen*, 392 U.S. 236 (1967), and *Meek v. Pittenger*, 421 U.S. 349 (1975),



the Supreme Court approved textbook loan programs substantially similar to the one adopted here. The Court has never, however, passed on the constitutionality of a program like the Minnesota one for distribution of other materials.<sup>3</sup>

As it is established under the Minnesota law, the textbook loan program requires the nonpublic schools to collect the loan requests of their students and pass them on to the school districts. The requested books must be "such secular, neutral, nonideological instructional materials as are available and of benefit to Minnesota public school students." Minn. Stat. § 123.932 subd. 1. A per-student ceiling on the requests for all instructional materials is set at the "statewide average cost per pupil unit" spent by the school districts in the previous academic year. Minn. Stat. § 123.933. This "cost per pupil unit" is determined by reference to certain categories, known as Code 220 (textbooks), 230 (libraries and audiovisual materials), and 240 (instructional supplies), in the school districts' annual report form. Stipulation No. 14, September 22, 1976.

Plaintiffs concede, and the Court agrees, that the statute in question is intended to serve an adequately secular purpose: treatment of nonpublic school students equal to that of public school students, so as to encourage freedom of choice in education and to allow for that cultural diversity which is basic to our way of life. Minn. Stat. § 123.931, *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 at 773, 783 (1972).

The boundaries of "primary effect" have been established in a series of school aid cases beginning with *Everson v. Board of Education*, 330 U.S. 1 (1947). The Court has held repeated-

<sup>3</sup> The scheme for distribution of other material involved in *Meek*, *supra*, provided for a loan directly to the schools. The statute in question here provides for loans directly to the pupils.

ly that aid to nonpublic school students, if it meets all the other tests of constitutionality, will not be invalid simply because it may provide an indirect benefit to religious schools by relieving some of their financial burden or making it easier for students to attend. *Tilton v. Richardson*, 403 U.S. 672 at 679 (1970); *Meek v. Pittenger*, *supra*, at 359. It also has noted that some interaction between church and state is inevitable in our society, and that the State's proper role is not to avoid all such contact but to maintain neutrality in its treatment of religious institutions. *Roemer v. Board of Public Works of Maryland, et al*, 44 U.S.L.W. 4939 at 4932-33 (June 22, 1976).

In the context of textbook distribution, the State's neutrality is preserved by providing aid directly to students instead of to schools, by making certain that the amount of aid does not exceed the per pupil amounts allocated for the same items in the public schools, and by requiring that the books so provided be of a secular nature only, incapable of diversion to religious use. *Board of Education v. Allen*, *supra*; *Meek v. Pittenger*, *supra*.

The scheme established by Minn. Stat. § 123.933 for loan of textbooks to private school students, if properly implemented, allows the State to provide such aid without producing a "primary effect" of aid to religious activity. The statute provides for the loan of textbooks directly to the private school student, an arrangement which received approval in *Board of Education v. Allen*, *supra*, and *Meek v. Pittenger*, *supra*. It attempts to equalize the amounts of aid to private and public school students. It also requires that the books purchased by the public school districts for loan to private school students be those which are suitable for use in the public schools, thus establishing a standard of secular content.

Plaintiffs have demonstrated to this Court that as a result of accounting methods used by the school districts, the value

of materials supplied under the statute to private school students may exceed in some instances the value of comparable materials provided for students in the public schools. The "cost per pupil unit" in the public schools is calculated by adding certain "codes" or categories on the annual financial report. The "codes" include items other than student textbooks or "instructional materials": teachers' aids and manuals, gas and oil for vehicles assigned to staff and not used in driver education, non-classroom office supplies. Instructions for Completing Annual Financial Report, Stipulation Exhibit C, September 22, 1976. Although many publishers provide teachers' manuals free, and items that are not precisely "instructional materials" may be negligible in some cases, it is possible that the statewide average "cost" calculated this way is greater than the actual amounts spent to provide public school students with materials. If this is true, then the private school students who receive aid in the amount of the public school "cost" could be receiving more actual aid than do public school students.

Plaintiffs contend that the private students' possible receipt of an "excess benefit" under the statute renders it unconstitutional. *Americans United for Separation of Church and State v. Benton*, 413 F. Supp. 955, 959 (1975). The Supreme Court has indeed held that provision of aid can be valid within the limits of the Establishment Clause only as long as the legislature limits itself to granting private school students no more than the same benefits as are received by public school students. *Board of Education v. Allen*, *supra*, at 243. The statutory scheme here provides on its face for equal benefits, and it is only by an accident of accounting procedure, easily remediable, that the benefits possibly could be unequal. The Court therefore orders the State to change its procedures so

as to have the "average cost per pupil unit" reflect the actual amount spent per pupil in the public schools for instructional materials only.

Plaintiffs also argue that the statute does not provide for adequate screening of textbook requests to ensure that public funds are used to provide only secular materials for private school students, resulting in a distinct possibility, if not probability, that the primary effect of the aid could be to support the religious mission of some private schools. In support of this argument, they have submitted to this Court the results of a survey made to determine the methods by which the school districts make decisions to approve the textbook requests passed on to them by the private schools on behalf of their students. Plaintiffs contend that the survey demonstrates the failure of the local districts to examine adequately the private schools' book requests for religiously oriented material, and the answers do indicate that few of the districts have any established book lists or other formal screening method. Defendants have contested the admission of the survey results into evidence, but the Court accepts them<sup>4</sup> and finds that plaintiffs' argument based on them is constitutionally irrelevant.

The statute provides that the only materials that may be supplied to private school students are "such secular, neutral and nonideological instructional materials as are available and are of benefit to Minnesota public school students." Minn. Stat. § 123.932 subd. 1. This definition presumes an initial determination by public officials that the materials in question

<sup>4</sup> Plaintiffs invoke Federal Rule of Evidence 803(24). Defendants claim that the survey is immaterial and inaccurate, having been composed with the purpose of eliciting desired responses and having been answered by persons lacking authority and/or knowledge. The Court finds the results of the survey to be material and sees no reason to resolve complex questions of survey procedures and controls at this time.



are suitable for use in public schools and are therefore "secular" in nature. It also is very similar to the definitions of "textbook" and "instructional materials," and thus also the screening process approved by the Supreme Court in *Meek v. Pittenger*, *supra*, at 354 n. 3, 361-62. That Court has never stated that an elaborate system of screening and prior approval is necessary in order to guarantee that an aid scheme will not have a primary effect of encouraging religious activity, and it has declared its trust in public officials to live up to their duty of maintaining church-state separation. *Board of Education v. Allen*, *supra*, at 245. This Court cannot and will not depart from the Supreme Court's position and accordingly finds that the textbook request scheme as established in Minn. Stat. § 123.933 is within the limits of the Establishment Clause.

B. *Instructional materials.*

Minn. Stat. § 123.933 provides for the loan of teaching materials other than textbooks under the same conditions as those that apply to the loan of textbooks. The maps, charts, recordings, films, library books, etc., may be requested by the private schools on behalf of their students and loaned to the students directly. As in the case of textbooks, title to materials which are not reusable passes immediately to the students, while title to reusable materials remains in the public school district and possession is given to the students. Standards for ensuring the secular nature and use of the materials, and the cost-per-pupil method of setting a ceiling on benefits, are the same as those that apply to the textbook loans.

In *Meek v. Pittenger*, *supra*, at 363, the Supreme Court found that Pennsylvania's program of a "direct loan of instructional material and equipment [to the private schools] has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools

benefitting from the Act." The Court recognized that the materials provided were of a secular nature only, that their use would not involve the State in an entangling process of policing, and that the purpose of the program was legitimately secular. It objected solely to the form of the program, the loan of materials directly to the schools. As the Minnesota statute is drawn, the loan program benefits the students rather than the schools; the schools are given use or possession of the materials only as may be necessary for the convenience of their students. The educational value and purpose of the materials in question here is not substantially different from those of textbooks, and this Court finds no constitutional objection to the loan of materials under the same conditions as those applying to the loan of textbooks. See *Wolman v. Essex*, No. C-2-75-792 (S.D. Ohio, July 21, 1976).

IT IS ORDERED:

1. That defendants' motion to dismiss the organizational plaintiffs be, and hereby is, denied.
2. That Minnesota Statutes § 123.932 and § 123.933, "Purchase or loan of instructional materials" to private schools, is hereby adjudged to be constitutional and plaintiffs' requests for declaratory judgment and an injunction are hereby denied, subject to the following condition:

That the Minnesota Department of Education revise its financial report form and instructions to conform to the requirements stated in the memorandum opinion.

GERALD W. HEANEY

United States Circuit Judge

EDWARD J. DEVITT

United States District Judge

EARL R. LARSON

United States District Judge

November 29, 1976.

LARSON, J., dissenting in part.

While I agree that this Court is bound by the holdings in *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Meek v. Pittenger*, 421 U.S. 349 (1975), to find the textbook provision of Minnesota Statutes § 123.933 constitutionally valid, I believe that the remainder of that statute is one of those "ingenious plans for channelling state aid to sectarian schools," *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 at 785 (1972), that cannot possibly coexist with the First and Fourteenth Amendments. In the first place, some of the material, such as maps, slides, and library books, may be capable of ready diversion to use in the teaching of religious themes.<sup>5</sup> More significantly, I find the form of the "loan" program to be a mere fiction created in an attempt to avoid constitutional objections to a scheme that benefits the private schools primarily and the students only incidentally.

Many of the items included in the statutory definition of "instructional materials," Minn. Stats. § 123.932, are things that normally are used by students only at school: globes, tapes, films, recordings, periodicals. Some of them, such as audio-visual materials and large charts or maps, ordinarily are used by groups of students at one time. At oral argument, counsel for defendant Casmey asserted that, to ensure that aid went to the students and not to the schools, the Department of Education would substitute individually usable materials for those normally used only in group settings, *e.g.*, thirty maps instead of one globe; small charts instead of large wall-hung ones. I find this suggestion to be unrealistic, financially

<sup>5</sup> Plaintiffs suggest, for example, that books such as *Here I Stand: A Life of Martin Luther*, or the works of certain philosophers, while apparently "neutral" in that they are available for use in the public schools, may be used for very different purposes in an institution with a primarily religious mission.

impractical, and pedagogically irresponsible. Such a policy implies, in essence, that in using public funds, private educational institutions must choose between providing no audio-visual materials and providing them for use *only* by individual students; it would result in a waste of those financial resources, the need for which resulted in passage of the statute at issue here; and it would force teachers to rely on possibly less effective materials in order to comply with the statute. The only alternative to this untenable result is the equally untenable fiction that the students are the only actual recipients of the loaned materials.

In an attempt to match the constitutionally valid textbook loan provisions, the statute establishes a Byzantine scheme for distribution of property rights in reusable instructional materials purchased with public funds. Title to the materials remains in the public school district. The right to custody and possession is in the private school. Because the constitutional basis of the scheme is a loan to students, the actual right to use must lie with the students individually. This scheme is rational insofar as textbooks are concerned, because the students do receive individual copies of books to use as they may during the school year, and the private schools can most conveniently store them during the summer. However, the characterization of materials that are traditionally and most effectively usable in a group setting or with group access as being loaned *to students* is a triumph of form over substance. Films, tapes, and some library materials, while provided for the use and benefit of students, are clearly items which must be held and accounted for by the institution. Students do not individually use them and it would be absurd to claim, even as a polite fiction, that students request them. The aid is requested by the private institutions and directly provided to them. The amount of aid could vary, depending on how much of the "cost



per pupil unit" limit is necessary to cover textbook needs; conceivably such aid could constitute the bulk of a school's requests.

In *Meek v. Pittenger, supra*, at 365-66, the Supreme Court rejected a scheme providing for loan of instructional materials to private schools as "inescapably result[ing] in the direct and substantial advancement of religious activity" despite the secular nature of the materials and the properly secular purpose of the statute. The Court has noted before that a statutory statement, that the aid is for the children or parents rather than for the schools, does not guarantee that it will withstand scrutiny under the Establishment Clause; the courts must look beyond the named recipient to the actual beneficiary. *Committee for Public Education and Religious Liberty v. Nyquist, supra*, at 781. I find that the foremost beneficiary of this aid program is the private school, which under this statute may be fully equipped by the State. The scheme thus has the primary effect of aiding schools that have been established in order to fulfill a religious mission, *Meek v. Pittenger, supra*, at 366, and accordingly is constitutionally invalid.

(Caption)

#### JUDGMENT

This action came on for hearing before the Court, Honorable Gerald W. Heaney, Circuit Judge, Edward J. Devitt and Earl R. Larson, United States District Judges, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that Defendants' motion to dismiss the organizational Plaintiffs be, and hereby is, denied.

It is Further Ordered and Adjudged That Minnesota Stat-

utes Section 123.932 and Section 123.933, "Purchase or loan of instructional materials" to private schools, is hereby adjudged to be constitutional and Plaintiffs' requests for declaratory judgment and an injunction are hereby denied, subject to the following condition: That the Minnesota Department of Education revise its financial report form and instructions to conform to the requirements stated in the memorandum opinion.

Filed Nov. 30, 1976.

HARRY A. SIEBEN, Clerk  
By BERNADINE L. BROWN  
Deputy

Dated at St. Paul, Minnesota, this 30th day of November, 1976.

HARRY A. SIEBEN  
Clerk of Court  
By BERNADINE L. BROWN  
Deputy Clerk

(Caption)

#### NOTICE OF APPEAL TO UNITED STATES SUPREME COURT

TO: Michael J. Bradley, Spec. Asst. Attorney General  
Mark B. Levinger, Spec. Asst. Attorney General  
303 Capitol Square Bldg.  
550 Cedar Street  
St. Paul, Minnesota 55101  
Briggs & Morgan  
W-2200 First National Bank Bldg.  
St. Paul, Minnesota 55101  
Meier, Kennedy & Quinn  
430 Minnesota Building  
St. Paul, Minnesota 55101



PLEASE TAKE NOTICE that all plaintiffs above named hereby appeal to the Supreme Court of the United States from that part of the Order of this Court in this action, dated November 29, 1976, adjudging Sections 123.932 and 123.933 of Minnesota Statutes to be constitutional, save and except such part of said Memorandum Order directing certain defendants to take remedial action.

Said appeal is taken pursuant to Title 28, United States Code, Section 1253.

Dated this 13th day of January, 1977.

WILLIAM I. KAMPF  
Attorney for Plaintiffs  
310 Empire Building  
Saint Paul, Minnesota 55101  
612—227-8209

#### AFFIDAVIT OF SERVICE BY MAIL

State of Minnesota  
County of Ramsey—ss.

William I. Kampf, being first duly sworn, deposes and says that on January 13, 1977, he served the attached Notice of Appeal upon Timothy Quinn, Esq., John Kenefick, Esq., and Michael Bradley, Spec. Assistant Attorney General, attorneys for defendants by placing a true and correct copy thereof in envelopes addressed as follows:

Mr. Timothy Quinn  
Attorney at Law  
Minnesota Building  
St. Paul, Minnesota

Mr. John Kenefick  
Attorney at Law  
Briggs & Morgan  
First National Bank Bldg.  
St. Paul, Minnesota 55101

Mr. Michael Bradley  
Spec. Assistant Attorney General  
303 Capitol Square Building  
St. Paul, Minnesota 55101

(which is the last known addresses of said attorneys) and depositing the same, with postage prepaid, in the United States mails at St. Paul, Minnesota.

WILLIAM I. KAMPF

Subscribed and sworn to before me this 13 day of January, 1977. — Marilyn Oines, Notary Public, Dakota County, Minnesota. My commission expires July 2, 1980.

#### STATUTES INVOLVED CHAPTER 396

An Act relating to education; children attending nonpublic schools; providing auxiliary services, textbooks, instructional materials and equipment; appropriating money.

*Be it enacted by the Legislature of the State of Minnesota:*  
Section 1.

#### 123.931 Declaration of policy

It is the intent of the legislature by Laws 1975, Chapter 396 to provide for distribution of educational aids such as auxiliary services, instructional materials and equipment so that every school child in the state will share equitably in education benefits and therefore further assure all Minnesota students and their parents freedom of choice in education.

## Sec. 2.

## 123.932. Definitions

Subdivision 1. "Instructional materials" means textbooks, books, workbooks, published materials, reusable workbooks or manuals, whether bound or in looseleaf form, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, globes, sound recordings, including but not limited to those on discs and tapes, processed slides, transparencies, film, filmstrips, kinescopes, video tapes, or any other printed and published materials of a similar nature made by any method: the term includes only such secular, neutral and nonideological instructional materials as are available and are of benefit to Minnesota public school students and are intended for use as implements or sources of study for a given class or group of students and which are expected to be available for the individual use of each pupil in such class or group; the term shall also include such secular, neutral, nonideological instructional materials as are normally provided and made available in public school libraries. The term shall be limited to "textbooks", "school library and audio visual materials" and "instructional supplies" as those terms or their equivalent are described and designated in the manual of instructions for uniform accounting for Minnesota school districts, published by the department of education.

Subd. 2. "Pupil units" shall be defined as in Minnesota Statutes, Section 124.17, Subdivision 1, Clauses 1 and 2.

Subd. 3. "Nonpublic school" means any school within the state other than a public school, wherein a resident of Minnesota may legally fulfill the compulsory school attendance requirements of Minnesota Statutes, Section 120.10, and which

meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).<sup>1</sup>

Subd. 4. "School" means any public or nonpublic school within the state wherein children receive educational services and materials provided for or recognized by the state, limited to kindergarten through grade 12.

Subd. 5. "Pupil" or "student" means a child enrolled in a school and is limited to children who are residents, or children of residents, of Minnesota.

Subd. 6. "Auxiliary services" means guidance, counseling and testing services; psychological services; services for handicapped children; remedial and therapeutic services; speech and hearing services; services for the improvement of the educationally disadvantaged; and such other secular, neutral, nonideological services as are of benefit to nonpublic school children and which are provided for public school children of Minnesota.

Subd. 7. "Intermediary service area" means a school administrative unit approved by the state board of education, other than a single school district, such as but not limited to the following: (a) a regional educational service area; (b) a cooperative of two or more school districts; (c) learning centers; or (d) an association of schools or school districts.

Subd. 8. "Equipment" means any item that is a moveable unit of furnishing, an instrument, a machine, an apparatus, or set of articles which meet all the following conditions: (1) It retains its original shape and appearance with use; and (2) It is nonexpendable, that is, if the article is damaged or some of its parts are lost or worn out, it is usually more feasible

<sup>1</sup> 42 U.S.C.A. § 2000d et seq.

to repair rather than replace it with an entirely new unit. The term shall be limited to secular, neutral, nonideological items and devices which are used by children in public schools and shall be limited to courses or curriculum relating to: physical education programs, laboratory sciences, mathematical sciences, business training, practical arts and vocational-technical programs. The term shall exclude any items and devices which are capable of being used for the instruction of religion or religious tenets.

Sec. 3.

123.933 Purchase or loan of instructional materials

The state board of education shall promulgate rules under the provisions of Minnesota Statutes, Chapter 15, requiring that in each school year, based upon formal requests by or on behalf of nonpublic school students in a nonpublic school, the local districts or intermediary service areas shall purchase or otherwise acquire instructional materials and loan or provide them for use by children enrolled in that nonpublic school. These instructional materials shall be loaned or provided free to the children for the school year for which requested. The loan or provision of the instructional materials shall be subject to rules prescribed by the state board of education. In the case of consumable or nonreusable instructional materials the title and possession may be surrendered to the nonpublic school student for whom they are provided; in the case of nonconsumable or reusable instructional materials the title to same shall remain in the servicing school district or intermediary service area, and possession or custody may be granted or charged to administrators of the nonpublic school attended by the nonpublic school pupil or pupils to whom the instructional materials were loaned. The cost per pupil unit of the

instructional materials provided for in Laws 1975, Chapter 396 for each school year shall not exceed the statewide average cost per pupil unit spent by the Minnesota public elementary and secondary schools for instructional materials as computed and established by the department of education by each preceding October 1 from the most recent public school year data then available. The commissioner shall allot to the school districts or intermediary service areas the total cost for each school year of providing or loaning the instructional materials for the students in each nonpublic school which shall not exceed the product of the statewide average cost per pupil unit multiplied by the number of nonpublic school pupil units enrolled as of October 1 of the preceding school year.

Sec. 4.

123.934 Purchase and provision or loan of equipment

The state board of education shall promulgate rules under the provisions of Minnesota Statutes, Chapter 15, requiring that in each school year, based upon formal requests by or on behalf of nonpublic school students in a nonpublic school, the local districts or intermediary service areas shall purchase or otherwise acquire equipment and loan or provide the same for use by children enrolled in that nonpublic school. This equipment shall be loaned or provided free for the children for the school year for which requested. The loan or provision of the equipment shall be subject to rules prescribed by the state board of education and prior to September 1, 1975, and January 1 of each year thereafter, the state board shall promulgate rules and regulations specifically designating which items and devices are capable of being used for the instruction of religion or religious tenets. Title to the equipment shall remain in the servicing school district or intermediary service



area, but possession or custody may be granted or charged to administrators of the nonpublic school attended by the nonpublic school pupil or pupils for whom the equipment is provided and loaned. The commissioner shall allot to the school districts or intermediary service areas the total cost for each school year of providing or loaning the equipment for the students in each nonpublic school, which shall not exceed \$10 per pupil unit enrolled as of October 1 of the preceding school year.

Sec. 5.

123.935 Provision of auxiliary services

The state board of education shall promulgate rules under the provisions of Minnesota Statutes, Chapter 15 requiring each school district or other intermediary service area to provide each year upon formal request by a specific date by or on behalf of a nonpublic school student enrolled in a nonpublic school, the same auxiliary services as are provided for Minnesota public school pupils. The requests shall be limited collectively to nonpublic school students enrolled in a given nonpublic school. The auxiliary services shall be provided in the student's respective school whenever possible by the district or intermediary service area wherein the nonpublic student's school is situated. The cost of the required services shall not exceed the amount allotted under this section to the participating district or intermediary service area. Each school year the commissioner shall allot to the school districts or other intermediary service areas for the provision of the services the actual cost of the services for that school year not to exceed \$50 multiplied by the number of nonpublic school pupils in grades 9 through 12 and \$75 multiplied by the number of nonpublic

school pupils in kindergarten through grade 8, enrolled as of October 1 of the last preceding school year.

Sec. 6.

123.936

In every event the commissioner shall make such payments to school districts or intermediary service areas pursuant to this act as are needed to meet contractual obligations incurred for the provision of benefits to nonpublic school students pursuant to section 123.933, 123.934 or 123.935.

Sec. 7. The provisions of this act shall be severable, and if any provision thereof, or the application of any such provision under any circumstances is held invalid, it shall not affect any other provision of this act or the application of any provision thereof under different circumstances.

Sec. 8.

123.937 Continuing appropriation

There is appropriated annually to the department of education from the general fund of the state treasury the sum of \$12,000,000 for the purposes of Laws 1975, chapter 396.

Sec. 9. This act is effective July 1, 1975.

Approved June 4, 1975.

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CHAPTER THIRTY-SEVEN: EDU 740-759  
INSTRUCTIONAL MATERIALS FOR PUPILS  
ATTENDING NONPUBLIC SCHOOLS  
(ALL NEW MATERIAL)

Edu 740 Policy

In order to promote equal educational opportunity for every school child in Minnesota and to assure all Minnesota pupils and their parents freedom of choice in education, the benefits provided by Minn. Laws 1975, Chapter 396 shall be made

available to pupils in nonpublic schools as provided in this chapter.

#### Edu 741 Textbooks

##### (a) General Administration

(1) The department of education shall administer funds allocated for the purchase of textbooks to be loaned to nonpublic school pupils.

(2) The department of education's administrative costs shall not exceed two percent of the state allocation for textbook loans.

(3) The department of education, in cooperation with the state auditor's office, shall establish proper accounting methods for fiscal control, fund accounting, and the maintenance of records for the acquisition of textbooks to be loaned.

##### (b) Local Administration

(1) Each nonpublic school pupil shall make an application through the nonpublic school for the 1975-76 year within 30 days of the effective date of this regulation and on or before March 1 for the following years for textbooks to be loaned by the public school district in which the nonpublic school office is located. The public school district shall transmit the application to the department of education. The applications shall be on a form prescribed by the commissioner. Application forms shall be available in the office of the public school superintendent on the effective date of these regulations.

(2) The department of education shall allocate aid for textbook purchases to the districts in which the nonpublic school office is located. The local school district shall make the purchases and transmit the textbooks.

(3) Textbooks loaned to pupils in nonpublic schools shall be maintained on inventory by the local school district.

(4) The local school district in its discretion may declare loaned school books unusable and permit the disposal of such textbooks.

(5) The nonpublic school shall maintain on file all applications for textbooks loaned to pupils in attendance in the nonpublic school. The applications shall be available to the department of education.

(6) Upon completion of the distribution of the textbooks each local school district may claim from the department of education for the administration of the textbook loan program a sum not to exceed five percent of the cost of the textbooks loaned.

##### (c) Availability of Funds

The average cost for textbooks shall be the total expenditure for textbooks reported by all public school districts in the state divided by the total number of pupil units based on an unduplicated count of pupils enrolled in the districts during the same fiscal year. For the 1975-76 school year, the amount of the allocation shall not exceed \$7.48 per nonpublic pupil unit as determined for the 1973-74 school year.

#### Edu 742 Other Instructional Materials

##### (a) General Administration

(1) The department of education shall administer funds allocated for the loan of other instructional materials, as defined in Minn. Laws 1975, Chapter 396, Section 2.

(2) The department of education's administrative costs shall not exceed two percent of the state allocation for other instructional materials.

(3) The department of education, in cooperation with the state auditor's office, shall establish proper accounting methods for fiscal control, fund accounting, and the main-

tenance of records for the acquisition of other instructional materials to be loaned.

(b) Local Administration

(1) Other instructional materials shall be loaned according to procedures set forth in Minn. Reg. Edu 741(b).

(2) Upon completion of the distribution of the other instructional materials, each local school district may claim from the department of education, for the administration of the other instructional materials loan program, a sum not to exceed five percent of the cost of the other instructional materials loaned.

(c) Availability of Funds

For the 1975-76 school year, the amount of the allocation shall not exceed \$37.95 per nonpublic pupil unit. The allocation shall be adjusted annually according to the most recent public school year data.

Edu 743-759 Reserved for future use.

(Caption)

STIPULATION

TO: JUDGES OF THE ABOVE NAMED COURT:

The parties to the above-referenced case, through counsel, hereby stipulate that the facts hereinafter set forth are true; that all documents appended hereto are true and correct copies of their originals; and that the following statement of facts, together with all documents identified herein and appended hereto, may be relied upon by the Court in the determination of the legal issues raised by the pleadings. This Stipulation is made by the parties to this proceeding upon and subject to the conditions that:

(a) all facts recited herein are stipulated by and between the parties for the purposes of this proceeding only and nothing contained herein shall constitute an admission by any party for any other purpose, action or proceeding;

(b) this stipulation to the truth and accuracy of the facts included herein and the documents appended hereto, does not constitute an admission by either party with respect to the relevancy or materiality of any such fact or document.

1. Each individual Plaintiff is a citizen of the United States and resides in and pays various taxes to the State of Minnesota. All other Plaintiffs are organizations having members who reside in and pay taxes to the State of Minnesota.

2. Each and every state Defendant is made a party Defendant solely in their respective official capacities, to-wit:

Howard Casmey is the commissioner of Education of the State of Minnesota;

James Lord is the Treasurer of the State of Minnesota;

Dorothea M. Chelgren, David C. Brandon, Henry J. Bromelkamp, Daniel F. Burton, Lorin A. Gasterland, Erling O. Johnson, Ruth A. Myers, Louis R. Smerling and Henry G. Tweten compose the Minnesota State Board of Education.

3. The two groups of Intervenor Defendants are composed of forty-four individuals. Thirty-three of the Forty-four individuals are minor children who are recipients of aid under the Act. Eleven of the Forty-four individuals are parents of recipients of aid under the Act and reside in and pay taxes to the State of Minnesota.

4. Minn. Laws 1975, Ch. 396 (M.S. §§123.931 to 123.937) was duly enacted June 4, 1975, and became effective July 1, 1975.



5. Pursuant to the aforesaid Act, the Board of Education of the State of Minnesota duly adopted rules referred to as Chapter 37, Edu 740-759, a copy of which is attached hereto as Exhibit A. These rules became effective on November 18, 1975.

6. Before aid may be received by an individual pupil, the pupil must request participation in the nonpublic school aid program. The request is submitted to the pupil's nonpublic school which in turn requests that materials be supplied to the pupil by the local public school district. Once the local public school district has supplied the materials to the pupil, the public school district is entitled to reimbursements for its costs and expenses from the State Department of Education. There have been no instances in which an individual pupil has applied for aid where the nonpublic school he is attending has chosen not to participate.

7. During the 1975-76 school year there were numerous nonpublic schools in which a certain portion of the pupils elected to participate in aid pursuant to the Act while other eligible pupils in the same school declined to so participate.

8. Some nonpublic pupils receiving aid pursuant to the Act attend nonpublic schools operated by churches or religious organizations. Some of these nonpublic schools:

- a) Have as one of their primary purposes the teaching, propagation and promotion of a particular religious faith;
- b) Conduct the sectarian portion of their operations, curricula and programs to fulfill that purpose;
- c) Require attendance at courses in religious doctrine or at religious worship services for those pupils of the same faith as that of the sponsoring church or organization;

- d) Are an integral part of the religious missions of the sponsoring church or religious organization;
- e) Contain religious symbols;
- f) Direct their teachers to limit certain subjects to be within the tenets of the particular religion.

9. Materials, supplies, equipment and services for which nonpublic pupils are eligible under the Act are provided to pupils in public schools at public expense.

10. The Minnesota Educational Directory, 1975-1976, published by the Department of Education, State of Minnesota, accurately sets forth the enrollment figures for both public and nonpublic elementary and secondary schools in Minnesota for the school year 1974-75.

11. Exhibit B accurately presents the following information for each local public school district in Minnesota, for the school year 1974-75:

- a) Total cost of textbooks;
- b) Total combined cost for textbooks, school library and audio-visual materials, and instructional supplies;
- c) Total cost per pupil unit for the textbooks, school library and audio-visual materials, and instructional supplies.

A further exhibit will be supplied for school year 1975-76 when available from the State Department of Education.

12. The attorney for Plaintiffs has distributed a questionnaire soliciting the responses of the superintendents of all the school districts in Minnesota. Plaintiffs' attorney has received answers from some of the school districts. Plaintiffs' attorney intends to submit in an affidavit a collation of the answers that were received. Defendants, however, do not agree that the answers received are either accurate, relevant, or admissible in evidence without further foundation.

13. Exhibit C is the annual financial report form and instructions for the school year ending June 30, 1976, required to be filed by August 1, 1976, by each public school district in the State of Minnesota.

14. The statewide average expenditure under M.S. §123.933 is calculated by adding Code 220, 230 and 240 of Exhibit C and dividing the sum by the statewide unduplicated pupil units.

15. Supplementary textbooks which are used in the public schools as reference materials are included in Code 220; some of these reference materials are funded by federal sources.

16. In the Minneapolis School District and possibly other school districts Code 220 includes expenditures for textbooks and reference materials for teachers as well as students.

WARREN SPANNAUS  
Attorney General  
State of Minnesota  
RICHARD B. ALLYN  
Solicitor General  
By MICHAEL J. BRADLEY  
Special Assistant  
Attorney General  
And MARK B. LEVINGER  
Special Assistant  
Attorney General  
Attorneys for State Defendants  
303 Capitol Square Building  
550 Cedar Street  
St. Paul, Minnesota 55101  
Telephone: (612) 296-3301

BRIGGS AND MORGAN  
By JOHN R. KENEFICK  
Attorneys for Intervenor  
Defendants David and  
Julaine Wachholz et al.  
W-2200 First National Bank  
Bldg.  
St. Paul, Minn. 55101  
Telephone: (612) 291-1215

WILLIAM I. KAMPF  
Attorney for Plaintiff  
310 Empire Building  
St. Paul, Minnesota 55101  
Telephone: (612) 227-8209  
MEIER, KENNEDY & QUINN  
By TIMOTHY P. QUINN  
And GORDON W. SHUMAKER  
Attorneys for Intervenor-  
Defendant, Lisa Garcia,  
et al.  
430 Minnesota Building  
St. Paul, Minnesota 55101  
Telephone: (612) 226-8844

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AFFIDAVIT

State of Minnesota  
County of Ramsey—ss.

William I. Kampf being first duly sworn deposes and says as follows:

In May of 1976, an auxiliary aids questionnaire (copy attached) was mailed to the 176 school district superintendents

in Minnesota. The object of the questionnaire was to survey the practices and procedures utilized to implement Minn. Stat. 123.931 et seq. (Supp. 1975). From a total of 176 requests, 116 responses were received, yielding a sampling ratio of better than 65 percent.

The questionnaire sought information concerning: expenditures under the act; the administrative burden imposed by the act; the character of textbooks supplied under the act; the details of the textbook selection and approval processes; meetings between public and non-public school officials; any rejected aid requests; any resulting aid reductions to public schools; and any increase in non-public school tuition or fees. Only those responses dealing with the selection and approval of textbooks will be tabulated here.

*Question 4:* Have any requests for textbooks or instructional materials on behalf of non-public school students been for books or materials not currently in use in your district?

#### RESPONSE

Yes 61 (52%)  
No 30 (26%)  
Other 25 (22%)

*Question 5:* Are books requested by non-public schools read to determine their religious content? (i.e. whether those books are secular, neutral and non-ideological?)

#### RESPONSE

Yes 14 (12%)  
No 92 (79%)  
Other 10 (9%)

Limiting the tabulation to those 61 districts answering yes to Question 4, the responses appear:

Yes 7 (7/61 - 11.5%)  
No 54 (54/61 - 88.5%)  
Other 0 (0%)

*Question 7:* Does your district have written standards to determine whether a book is: secular?, neutral?, non-ideological?

#### RESPONSE

Yes 2 (2%)  
No 96 (83%)  
Other 18 (15%)

No response actually contained any written standards specifically pertaining to the described parameters.

*Question 8:* If there are no written standards regarding Question 7, please describe what standards are used to determine if a book is:

- A. secular
- B. neutral
- C. non-ideological

**RESPONSE** The diversity of answers precludes a concise tabulation. Only one district actually defined the applicable standards, a few districts referred to the State Department of Education regulations or the American Library Association policy, and the bulk of the responses indicate they had no such standards. It is of consequence to note that at least nine districts indicated that determinations pertaining to textbook content were the responsibility of the non-public school ordering the books.



*Question 13 A:* In your district, have any requests by non-public schools for instructional materials, textbooks or supplies been rejected because of potential use for religious purposes or instruction?

**RESPONSE**

Yes 7 (6%)

No 107 (92%)

Other 2 (2%)

*Question 13 B:* Please describe any rejected requests?

**RESPONSE** The rejected requests included orders to secular publishing houses.

Further Affiant saith not.

**WILLIAM I. KAMPF**

Subscribed and sworn to before me this 21st day of September, 1976. — Marilyn Oines, Notary Public, Dakota County, Minnesota. My commission expires July 2, 1980.